

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

PERFECT CARE MEDICAL PRODUCTS, INC. ¹)	
)	
Employer)	
)	Case No. 29-RC-11247
LOCAL 338, RETAIL, WHOLESALE,)	
DEPARTMENT STORE UNION / UNITED FOOD)	
AND COMMERCIAL WORKERS)	
)	
Petitioner)	

**REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

Perfect Care Medical Products, Inc., herein called the Employer, warehouses and distributes medical supplies. Local 338, Retail, Wholesale, Department Store Union/United Food and Commercial Workers, herein called the Petitioner, filed a petition with the National Labor Relations Board, herein called the Board, under Section 9(c) of the National Labor Relations Act, herein called the Act, seeking to represent a bargaining unit consisting of all full-time and regular part-time drivers, warehouse employees and plant clerical employees employed by the Employer, but excluding all supervisors, managers, office clericals and guards as defined in the Act.²

A hearing was held before Rachel Zweighaft, Hearing Officer of the Board. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.

¹ The name of the Employer appears as amended at the hearing.

²The unit description appears as amended at the hearing.

The parties are in disagreement over the status of two individuals, Kerece Morrison and Crystal Feliciano. The Petitioner takes the position that they are plant clerical employees, and are part of the petitioned-for bargaining unit. According to the Employer, Feliciano is an office clerical employee, and Morrison is either a manager, a supervisor, or an office clerical. Further, the Employer contends that it does not employ any plant clerical employees. The Employer does not specifically contest the appropriateness of a unit of drivers, warehouse employees and plant clerical employees.

The witnesses on behalf of the Employer were Kevin Mernone, president and owner, and Fran Freiman, vice president of operations for a related company, Perfect Care, Inc. The Petitioner's witness was Kerece Morrison, whose title (according to the Employer) is manager of purchasing and long-term care manager.

I have considered the evidence and the arguments presented by the parties. As discussed below, I have concluded that Crystal Feliciano and Kerece Morrison are not plant clericals, and must be excluded from the petitioned-for bargaining unit. Because I have concluded that Kerece Morrison is not in the unit, it is not necessary to reach the issue of whether she is a manager, a supervisor or an office clerical employee, as alleged by the Employer. Further, since office clerical employees are specifically excluded from the petitioned-for unit, it is not necessary to determine whether an alternative unit that includes office clericals would be appropriate.³

Although the Employer does not specifically contest the appropriateness of a unit consisting of drivers, warehouse employees, and plant clericals, in the absence of any employees who are employed as plant clericals, I have directed an election in a unit

³ Prior to amending the petition at the hearing, the Petitioner sought an Employer-wide bargaining unit that would have included office clerical employees.

limited to drivers and warehouse employees. The facts and reasoning that support my conclusions are set forth below.

FACTS

THE EMPLOYER'S OPERATIONS

The record reflects that the Employer warehouses and distributes disposable medical items such as adult diapers and latex and vinyl gloves, as well as durable medical products ("DME") such as wheelchairs, crutches, canes, commodes and hospital beds. The business is split into two "sides": the nursing home / long-term care side, and the home care / DME side, which sells durable medical equipment to surgical supply stores. The Employer has over 300 customers, including about 75 nursing homes that order merchandise every week, and over 65 home care accounts. Most of its suppliers have warehouse facilities in the United States and offshore manufacturing facilities. Freiman testified that there are about two dozen revolving vendors, supplying about 2,000 specific items, or "SKU's."

There are 14 employees on the Employer's payroll: seven drivers, five warehouse employees, and the two individuals whose status is in dispute. Of the warehouse employees, two are on the day shift, and three are on the night shift. The day warehouse crew unloads deliveries from the Employer's suppliers, and stores the incoming merchandise on shelves and racks. The night shift picks merchandise for delivery to the Employer's customers, brings it to the staging area, and then loads it on the Employer's trucks. The deliveries are made by the Employer's drivers.

PERFECT CARE, INC.

A related company, Perfect Care, Inc.,⁴ is staffed by an undisclosed number of sales and telemarketing employees, and a number of managers and/or employees with managerial-sounding job titles.⁵ These include Patricia Martinson, accounts receivable manager, Fran Freiman, vice president of operations, Glenn Mernone (Kevin Mernone's brother), who is in charge of information technology ("IT"), and Rohan Singh, financial manager and bookkeeper. Nydia Tirebio, Singh's assistant, is also the DME / home care manager and the billing manager. In addition, Perfect Care, Inc., employs two warehouse managers, Antonio Remouth for the day shift and Craig Jefferies for the evening shift.

REPORTING STRUCTURE

The warehouse managers supervise the Employer's drivers and warehouse employees. Morrison reports to Fran Freiman and Kevin Mernone, and Feliciano reports to Singh, Tirebio, and (according to the Employer) Morrison. Morrison denied that Feliciano reports to her.

THE EMPLOYEES' WORK LOCATIONS

The Employer's facility consists of a warehouse on the ground floor measuring about 20,000 feet, two loading docks, an enclosed yard off the warehouse where the Employer parks its seven trucks, and an office area on the second floor. Working in the office area are the two disputed individuals, Morrison and Feliciano, as well as Singh, Freiman, Martinson, Tirebio, the two Mernones, and at times, the sales employees.

⁴ Freiman testified that the Employer and Perfect Care, Inc., are owned and managed by the same individuals. The parties did not take positions as to whether the Employer and Perfect Care, Inc., are a single integrated enterprise.

⁵ For the purposes of this decision, it is not necessary to determine which of these individuals are managers within the meaning of the Act. The job title of "manager" is not dispositive. *See Bell Aerospace Company Division of Textron Inc.*, 416 U.S. 267, 290 n. 19, 94 S.Ct. 1757, 1769 n. 19 (1974).

These individuals perform close to 100% of their work in the office area, and the warehouse employees perform 100% of their work in the warehouse area. The drivers perform most of their work away from the facility, and are only in the second floor office area to drop off paperwork with Nydia Tirebio. The warehouse managers' office is on the ground floor, off the warehouse. A lunch room on the ground floor is used by warehouse employees and drivers.

INTERCHANGE AND CONTACTS

The two individuals whose status is in dispute, Morrison and Feliciano, have very little interaction or interchange with the drivers and warehouse employees. The drivers and warehouse employees have never filled in for Morrison or Feliciano, and Morrison and Feliciano have never filled in for them. Moreover, there is no overlap between the skills, functions and qualifications of the disputed individuals and those of the drivers and warehouse employees.

However, the office staff is sometimes in telephone contact with the drivers. During the day, if customers call to inquire into the status of their deliveries, "whoever answers the telephone" in the office then contacts the drivers on their Nextels to find out how long it will be before they arrive at the delivery location. The record does not reveal how often this occurs.

Morrison testified that she visits the warehouse when she needs to have "someone" check on whether an item is in stock. The frequency of such visits is not in evidence. Morrison further testified that when a customer comes to the Employer's facility to pick up an item, she gives tickets for such pick-ups to the warehouse workers. She did not indicate how often this occurs. Morrison also provides various paperwork to

the warehouse managers on a daily basis, and accompanies FDA inspectors to the warehouse when they appear for the purpose of taking samples for testing. However, it appears from the record that only a small fraction of Morrison's time is spent outside the office area.

There is no evidence that Feliciano has ever been in the warehouse.

Morrison testified that when she is on vacation, Tirebio, Freiman and Glen Mernone fill in for her. Conversely, when Tirebio is not in the office, Morrison fills in for Tirebio with respect to her billing functions. The functions currently performed by Morrison were previously handled by Tirebio, Freiman and Glenn Mernone.

WORK SCHEDULES

The record reflects that the drivers work from 6:00 a.m. until they are finished with their routes, in the late morning or afternoon. Among the warehouse employees, the morning shift is from 6:00 a.m. until about 2:00 or 2:30 p.m., and the afternoon shift runs from about 1:00 p.m. or 2:00 p.m. until "closing time," which "could be 8:00, 9:00, or 10:00," according to Freiman.

Crystal Feliciano works from 8:30 a.m. until 4:30 p.m., and Morrison's hours are from 9:45 a.m. until 5:45.

JOB FUNCTIONS OF CRYSTAL FELICIANO

Feliciano's job title is customer service representative. Her job functions include answering customers' telephone calls, responding to customer complaints, recording customer orders by hand, and entering customer orders into the computer system. In addition, she performs general office work such as photocopying, filing, faxing and envelope-stuffing.

JOB FUNCTIONS OF KERECE MORRISON

Purchasing / Placing Orders

Morrison testified that she is in charge of purchasing, and that she orders at least 95% of the merchandise sold by the Employer. The remaining 5% is purchased by Fran Freiman or Nydia Tirebio. When Morrison places orders with vendors, she enters the orders into the Employer's computer system. The computer system automatically inserts current prices and other information from a computerized database, which is updated by Morrison when she receives information on vendors' price changes and rebates. There was conflicting testimony as to whether Morrison negotiates prices with vendors.

Maintaining Inventory

Morrison is responsible for maintaining inventory and insuring that the Employer neither runs out of product nor becomes overstocked. Several factors have to be considered, and Morrison is aided in this process by computer programs designed by Glenn Mernone. In this regard, there was conflicting testimony on the extent of Morrison's discretion.

Fill Orders

Several times a year, when the Employer runs out of an item because of delays in shipments, or problems with U.S. Customs or the Food and Drug Administration ("FDA"), Morrison is in charge of obtaining a "fill order," which is a type of emergency order. Possible sources for fill orders include the manufacturer responsible for the delay, other suppliers, or other distributors.

There was conflicting testimony regarding the extent of Morrison's discretion (if any) to select vendors and negotiate prices with respect to fill orders.

Scheduling Deliveries

Morrison testified that she schedules the delivery of incoming freight, and prepares the warehouse delivery schedule each day. On average, Morrison schedules “two and a half” trucks per day, the first of which is always from the same supplier. At the end of the day, she leaves the delivery schedule on the day manager’s desk.

Liaison with the Food and Drug Administration (“FDA”)

The record reflects that certain items distributed by the Employer, such as examination gloves used by doctors to examine patients, are regulated and inspected by the FDA. With respect to FDA inspections, Morrison serves as the liaison or contact person between the FDA inspectors, the warehouse managers, and the vendors.

Checking Invoices

Morrison testified that when a vendor’s invoice come in, she checks whether the information on the invoice is correct. If it is, Morrison initials the invoice and gives it to Rohan Singh for payment. If not, Morrison handwrites changes on the invoice and faxes it to the vendor. For example, Morrison adjusts the invoice if an item is damaged, or fails FDA inspection. If there is a discrepancy between the prices on the invoice and those on the Employer’s original purchase order, or between the number of items delivered and the number of items for which the Employer is billed, Morrison makes the correction and re-computes the total. If a detention charge, for taking more than two hours to unload a truck, is not correct, Morrison corrects the invoice accordingly.

There was conflicting testimony regarding the extent of Morrison’s discretion to make such changes, and the extent to which she handles negotiations (if any) with vendors regarding these changes.

Procedure when Deliveries have no Packing Slip

When a shipment arrives with no packing slip, the warehouse manager writes one up for Morrison, setting forth the number of pieces that were received for each item. Morrison then goes into the system and matches each delivery with the appropriate purchase order, and writes in the purchase order numbers on the “packing slip” written up by the warehouse manager.

Checking Inventory

Morrison testified that at the end of the day, she prints out a report for the purchasing manager, which displays information on items to be delivered the following day. When the items are delivered, the warehouse manager does a count of the number received, as well as the number already stocked in the warehouse at the time of delivery, which he checks against the Employer’s computerized inventory records.

On occasion, Morrison may request that the warehouse manager do an inventory check of a certain item, such as when there is a discrepancy between what the computer indicates is in stock and what is actually in the warehouse. Partial inventory checks, referred to as “cycle counts,” are also performed at the request of Fran Freiman.

Morrison testified that the last time the Employer did a full inventory was in October, 2004. Morrison was not involved in physically conducting the inventory. Rather, she and Tirebio input the information into their computers.

Customer Service Functions

Morrison testified that she performs some customer service functions. For example, she stated that she is responsible for standing orders from certain nursing homes, which order the same products each week.

Pick Sheets and Pick Tickets

Freiman testified that throughout the day, Morrison and Tirebio print out “pick sheets” with the names of customers and the items they are ordering. After generating the pick sheets, Morrison and Tirebio “throw them out the window” leading from the office to the warehouse, and the warehouse manager picks them up.

The pick sheets provide a partial indication of what the customers’ orders will look like by the end of the day. This enables the warehouse employees to move the merchandise out of the racks and into the staging area, to be loaded onto the Employer’s trucks.

Before Morrison leaves for the day, she prints out the formal “pick tickets,” which are the delivery tickets the customers will receive. She then brings them downstairs to the night warehouse manager, who, with input from the drivers, uses these pick tickets to route the trucks.

The information on the pick sheets and pick tickets is based on the customer orders entered into the computer by Feliciano.

DISCUSSION

The most important factors in determining whether employees are plant clericals are whether they have significant direct contact with production employees, whether they perform work in the production area, and whether their work is closely allied with the production process. The Board has found the first of these factors to be the most crucial:

Clericals whose principal functions and duties relate to the general office operations and are performed within the office itself are office clericals who do not have a close community of interest with a production unit. A key element in determining whether a community of interest exists is whether the asserted plant clericals ‘perform functions closely allied to the production process or to the daily operations of the production facilities at which they work...the crucial element in finding such an alliance with the production process, is significant contact with production employees. Thus, in cases where employees were found to be plant

clericals, the Board consistently relies upon the presence of significant direct contact with production employees in finding functional integration with the production process and a sufficient community of interest. On the other hand, where the Board finds employees not to be plant clericals, it consistently relies heavily on the absence of evidence of substantial contact with production employees to conclude that that the asserted plant clericals do not share a community of interest with production employees and / or are office clerical employees.

Palagonia Bakery, 339 NLRB No. 74, slip op. at 41-42 (2003)(internal citations omitted).

Significant direct contact with production employees is a crucial element in the case law cited by the Petitioner in the instant case, in support of its argument that Morrison and Feliciano are plant clericals.⁶ For example, the Petitioner relies on *Houston Sash & Door Company, Inc.*, 127 NLRB 1089 (1960), in which the Board found order clerks, price clerks and shipping clerks to be plant clericals because they had frequent contact with production and maintenance employees, but little or no contact with office clerical employees. The Petitioner also cites *The ABS Corporation*, 299 NLRB 516 (1990), in which certain challenged voters were found to be plant clericals on the basis of their regular contacts with unit employees, common supervision, and the performance of work which was an integral part of the production process, such as performing ink readings on the printing presses, and beginning the physical process which resulted in the production of a printing plate.

In *Healthco, Inc.*, 233 NLRB 835 (1977), also relied on by the Petitioner, the Board found purchasing agents, customer service representatives and coordinators to be plant clericals, because they worked closely with warehouse employees, assisting them in various tasks and filling in for warehouse workers who were ill or on vacation. In addition, they reported to the same supervisors, worked the same hours, and shared a

⁶ See brief of Petitioner at 13-15.

common lunchroom. *Healthco*, 233 NLRB at 835-36. In *T.E. Hamilton*, 270 NLRB 331 (1984), the employees found to be plant clericals spent a portion of their working time in the production area, filling sample orders for customers, assisting in the loading and unloading of trucks, stamping tags on products, and occasionally contributing to the design and development of new products.

In the instant case, by contrast, the two individuals whose status is in dispute spend nearly all of their time in the second floor office area. They have minimal contact with the warehouse employees and drivers, and do not perform any of the same tasks. Rather, their work is only “incidental to, and not an integral part of, the production process.” See *Avecor, Inc.*, 309 NLRB 73, 75 (1992), relied on by the Employer herein.⁷ Morrison and Feliciano do not fill in for the warehouse employees or drivers, and the warehouse employees and drivers do not fill in for them. The only evidence of overlapping job duties and interchange is among Morrison, Feliciano, and other office staffers.

Moreover, Morrison and Feliciano do not work the same hours as the drivers or warehouse employees, and they are separately supervised. Although Morrison is in the warehouse for a small portion of her working day, her contacts while there are primarily with the warehouse managers, not with the warehouse employees.

Accordingly, I find that Morrison and Feliciano are not plant clerical employees, and are not members of the bargaining unit sought by Petitioner. Because this finding does not affect the appropriateness of the petitioned-for bargaining unit, I will direct an election in the unit sought by Petitioner.

⁷ Brief of Employer at 30-31.

CONCLUSIONS AND FINDINGS

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.
2. The parties stipulated that Perfect Care Medical Products, Inc., herein called the Employer, a domestic corporation with its principal place of business located at 8927 126th Street, Richmond Hill, New York, is engaged in the warehousing and distribution of medical supplies. During the past year, which period is representative of its annual operations generally, the Employer, in the course of its business operations, purchased and received at its Richmond Hill, New York facility, goods and materials valued in excess of \$50,000, directly from points located outside the state of New York.

Based upon the stipulation of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act. The labor organization involved herein claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers and warehouse employees employed by the Employer, but excluding all supervisors, managers, office clericals and guards as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls.

Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by Local 338, Retail, Wholesale, Department Store Union/United Food and Commercial Workers.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor, Brooklyn, New York 11201 on or before **November 3, 2005**. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notices of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. The Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days

prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB No. 52 (1995). Failure of the Employers to comply with these posting rules shall be grounds for setting aside the elections whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **November 10, 2005**. The request may be filed by electronic transmission through the Board's web site at NLRB.Gov but **not** by facsimile.

Dated: October 27, 2005, Brooklyn, New York.

/S/ ALVIN BLYER

Alvin P. Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

APPENDIX

The transcript is hereby amended as follows:

<u>Pages</u>	<u>Transcript Version</u>	<u>Corrected Version</u>
302-33	Judge Nations	Hearing Officer Zweighaft
228-349	Renowne	Mernone